STATE OF MICHIGAN

COURT OF APPEALS

THOMAS M. SMITH,

Plaintiff-Appellee,

v

HAMILTON'S HENRY VIII LOUNGE, INC., d/b/a HENRY VIII LOUNGE,

Defendant-Appellant.

UNPUBLISHED
August 2, 2002

No. 231031
Wayne Circuit Court
LC No. 97-711603-NO

Before: Murphy, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from the entry of judgment following the jury's verdict in plaintiff's favor in this premises liability case. We affirm.

I

This case arises out of an altercation that occurred at defendant bar during the early morning hours of September 14, 1996. Plaintiff entered the bar with a friend after both had been drinking at previous bars during the evening. Plaintiff got into a fight with two other bar patrons[1] and the bar's bouncer ultimately intervened. The bar's policy it to have the larger group leave first, so the bouncer asked the two patrons to leave. The two men left the bar, but remained in the parking lot and they later joined with Carl Uhl and Uhl's friend, who had also been patrons in the bar. The bouncer was aware that the men remained in the parking lot because he was monitoring a video surveillance camera. Sometime after the two men were ejected from the bar, plaintiff left (the time and circumstances of his leaving are in dispute). Apparently, plaintiff could not leave through the front door, where he would have avoided his assailants, and when he exited through the back door, Uhl grabbed him and the men proceeded to beat him. A waitress called the police, who arrived thereafter. Plaintiff did suffer rather serious injuries as a result of the assault.

Plaintiff filed suit on April 16, 1997, alleging, among other things, that defendant failed to immediately call the police after plaintiff had been threatened while still in the bar and

[1] The two men were never named at trial, apparently because they were never located after the assault.

actively ejected plaintiff from the bar knowing that people who had threatened plaintiff in the bar were waiting outside the door. A jury trial was held and the jury found in plaintiff's favor, specifically finding that defendant was negligent and that plaintiff suffered injury as a proximate cause of defendant's negligence. The jury found that plaintiff suffered damages and awarded a total of $172,100.

II

Defendant first argues that the trial court erred in denying its motion for a directed verdict regarding whether it owed a duty to plaintiff.

> In reviewing a trial court's decision on a motion for a directed verdict, an appellate court is to examine the evidence and all reasonable inferences that may be drawn from it in the light most favorable to the nonmoving party. . . . Only if the evidence so viewed fails to establish a claim as a matter of law should the motion be granted. [*Clark v Kmart Corp,* 465 Mich 416, 418-419; 634 NW2d 347 (2001).]

Questions concerning whether a duty exists is for the court to decide as a matter of law. *Scott v Harper Recreation, Inc,* 444 Mich 441, 448; 506 NW2d 857 (1993).

This case involves the scope of the duty that premises owners owe to invitees to protect them from the criminal acts of third parties. Although this issue has resulted in inconsistent decisions from our Supreme Court, the latest pronouncement can be found in *MacDonald v PKT, Inc,* 464 Mich 322, 338; 628 NW2d 33 (2001)[2]:

> To summarize, under *Mason [v Royal Dequindre, Inc,* 455 Mich 391; 566 NW2d 199 (1997)], generally merchants "have a duty to use reasonable care to protect their identifiable invitees from the foreseeable criminal acts of third parties." *Id.* at 405. The duty is triggered by specific acts occurring on the premises that pose a risk of imminent and foreseeable harm to an identifiable invitee. Whether an invitee is readily identifiable as being foreseeably endangered is a question for the factfinder if reasonable minds could differ on this point. See *id.* at 404-405. While a merchant is required to take reasonable measures in response to an ongoing situation that is taking place on the premises, there is no obligation to otherwise anticipate the criminal acts of third parties. Consistent with *Williams [v Cunningham Drug Stores, Inc,* 429 Mich 495; 418 NW2d 381 (1988)], a merchant is not obligated to do anything more than reasonably expedite the involvement of the police. We also reaffirm that a merchant is not required to provide security guards or otherwise resort to self-help in order to deter or quell such occurrences. *Williams, supra*.

Although the Court in *MacDonald* considerably narrowed the scope of the duty owed by a premises owner to an invitee in cases involving the criminal acts of third parties, we find that

[2] We note that *MacDonald* was decided while this case was on appeal and about two years after the trial was held.

plaintiff alleged and presented sufficient evidence at trial to sustain the jury's verdict. Specifically, plaintiff alleged in his complaint that defendant failed to immediately call the police after plaintiff had been threatened while still in the bar and actively ejected plaintiff from the bar knowing that people who had threatened plaintiff in the bar were waiting outside the door.

Taken in a light most favorable to plaintiff, the evidence adduced at trial established that plaintiff was an identifiable invitee because he had been a patron purchasing drinks at defendant bar. Further, there was ample evidence that the assault in the parking lot was a foreseeable act. Here, specific acts occurred on the premises when plaintiff and two other bar patrons got into an altercation in the bar that led to the intervention by the bar's bouncer, Michael Harrington. Harrington's testimony in this regard was that there was a verbal altercation between plaintiff and two other bar patrons and that plaintiff threw a punch at one of the men. According to Harrington, Uhl spoke with the two men while they were still in the bar. Following the bar's policy, Harrington had the two men leave the bar, although they remained by the back door in the parking lot. Harrington testified that he knew that the group of men remained by the back door because he was monitoring the video surveillance camera.

It is not clear when, but at some time, plaintiff was compelled to leave the bar against his will by Harrington. Although there was testimony that plaintiff was simply required to leave at the legally mandated time of 2:30 a.m., the police officer who received the call from the bar after the beating occurred, testified that the call was received at 2:07 a.m. Further, plaintiff testified that Harrington physically threw him out of the back door when plaintiff asked Harrington to make sure that it was safe to leave. The manager, Thomas Ahlijian, told plaintiff that he had to leave and "might have" asked Harrington to walk out with plaintiff. Although the front door was locked, Ahlijian stated that it was always possible to open the front door from the inside and the bouncers were aware of this.

As soon as plaintiff exited from the back door, he was grabbed by Uhl and beaten. Harrington testified that he saw the beating on a video monitor, but did nothing because he was required to remain inside while the money was being placed in the safe. Ahlijian testified that after he asked plaintiff to leave, he returned downstairs and, "within a short time," glanced at the video monitor and saw that someone was being beaten in the parking lot. Ahlijian then ran upstairs, got Harrington, and they ran outside, at which point the assailants ran away. Anita Smith, a waitress, testified that Ahlijian told plaintiff that he had to leave. She then saw plaintiff being beaten on the video monitor, and called the police. According to Harrington, the police arrived about ten minutes after the beating occurred.

Based on this evidence adduced at trial, we conclude that defendant's duty to use reasonable care to protect plaintiff from the foreseeable criminal act perpetrated by the three men was triggered because specific acts occurred in the bar with the initial altercation between plaintiff and two men and the ultimate assault that occurred in defendant's parking lot immediately outside the back door. There was clearly a known risk of imminent and foreseeable harm to plaintiff because the two men were ejected and Harrington knew that three or four men were lingering in the parking lot because he observed them on the video monitor. Plaintiff was then compelled to leave the bar through the back door despite the fact that he could have been escorted out the front door and despite the fact that Harrington knew that the men were still in the parking lot. Additionally, there was evidence that defendant did not *reasonably expedite* the involvement of the police. Harrington watched the assault on the video monitor and did nothing

by his own admission. Ahlijian did not call the police, and Smith was the only employee who called the police at an unspecified time after the assault occurred. Harrington testified that the police arrived ten minutes after the assault occurred.

Moreover, the evidence in this case indicates more than mere nonfeasance, but actual misfeasance, on defendant's part. In other words, this is not a case where defendant did nothing to protect plaintiff from the criminal act of third parties, but rather, actually engaged in conduct that brought about the danger to plaintiff. There was evidence that Harrington threw plaintiff out the back door where he was fully aware that the men involved in the altercation with plaintiff in the bar remained. Consequently, the jury could well have found that defendant breached its duty to use reasonable care to protect plaintiff, an identifiable invitee, from the risk of imminent and foreseeable harm to him. *MacDonald, supra*; *Schneider v Nectarine Ballroom, Inc (On Remand),* 204 Mich App 1, 6-7; 514 NW2d 486 (1994).

To the extent that defendant now faults the trial court for not applying the wrongful conduct rule, *Orzel v Scott Drug Co,* 449 Mich 550; 537 NW2d 208 (1995), to preclude plaintiff's recovery, we find that this argument has been forfeited because it was never raised in the trial court.

Accordingly, the trial court did not err in denying defendant's motion for a directed verdict because there was sufficient evidence adduced at trial to support a finding that defendant owed a duty to plaintiff that was triggered by specific acts occurring on defendant's premises that posed a risk of imminent and foreseeable harm to plaintiff.

III

Defendant also argues that plaintiff's trial testimony that there was no connection between the altercation inside the bar and the attack on him outside the bar was binding as a judicial admission, thereby proving that defendant owed no duty as a matter of law. Plaintiff testified at trial that the attack on him resulted from a criminal conspiracy to rob him in which an employee of defendant was a participant, a theory which, defendant asserts, should have precluded a verdict in plaintiff's favor because an employer cannot be held vicariously liable for acts of an employee clearly outside the scope of employment. The trial court rejected this argument, finding that it was the jury's role to determine whether the attack occurred in this fashion. Defendant contends that the trial court erred by not treating this testimony as a binding judicial admission under MRE 801 and *Ortega v Lenderink,* 382 Mich 218; 169 NW2d 470 (1969).

The trial court correctly held that plaintiff made no binding judicial admission at trial. MRE 801(d)(2) relates to hearsay and provides that out-of-court admissions by a party to a lawsuit are admissible under certain circumstances. MRE 801 says nothing about binding judicial admissions. A binding judicial admission is a statement made by a party or counsel at trial and is "a distinct, formal, solemn admission made for the express purpose of. . . dispensing with the formal proof of some fact at trial." *Ortega, supra* at 222-223. Plaintiff made no formal admission of fact at trial, and, as the trial court correctly ruled, it was for the jury to determine how the attack occurred since there was conflicting testimony on this point. Plaintiff "is entitled to the benefit of testimony in support of a verdict in his favor despite his expression of an opinion inconsistent" with it. *Id.* at 223.

IV

Defendant next contends that the trial court abused its discretion in admitting a videotape, filmed by defendant's surveillance camera, showing the assault on plaintiff. The trial court's evidentiary determination in this regard is reviewed for an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998).

Defendant contends that the videotape should not have been admitted because its probative value was substantially outweighed by the danger of unfair prejudice. MRE 403. The videotape in question, a black and white film of comparatively poor resolution and shot in relatively dim lighting, fails to show a great deal of detail, and depicts nothing which is particularly gruesome in terms of the injuries to plaintiff. On the other hand, the probative value of the videotape, which shows how plaintiff was injured and what defendant's agents testified they saw with respect to his injuries, is high. The probative value is not, therefore, substantially outweighed by the danger of unfair prejudice, and the trial court did not abuse its discretion in so finding.

V

Defendant next argues that the trial court erred in failing to give a cautionary instruction with respect to the videotape and in failing to give a comparative negligence instruction.

With regard to the contention that the trial court erred in failing to give a cautionary instruction concerning the videotape, defendant never requested such an instruction at trial and never objected to the fact that no such instruction was given. Consequently, defendant has failed to properly preserve the issue. MCR 2.516(C). Unpreserved instructional issues are reviewed only to determine whether manifest injustice exists. *Phinney v Perlmutter*, 222 Mich App 513, 557; 564 NW2d 532 (1997). Manifest injustice occurs where the failure to give an instruction is of such magnitude as to constitute plain error requiring a new trial, or where it pertains to a basic and controlling issue. *Id.* Here, there is no manifest injustice because the cautionary instruction regarding the videotape does not pertain to a basic and controlling issue in the case, nor does the failure to give such an instruction constitute plain error. Indeed, defendant does not even state how the jury should have been cautioned in its appellate brief.

With respect to the argument that the trial court erred in failing to give a comparative negligence instruction, such an instruction was requested by defendant and denied by the trial court for the reason that plaintiff's actions could not be deemed to be a proximate cause of his injuries.

> We review claims of instructional error de novo. In doing so, we examine the jury instructions as a whole to determine whether there is error requiring reversal. The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. . . . Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. . . . We will only reverse for instructional error where failure to do so would be inconsistent with substantial justice. [*Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).]

The trial court did not err in denying defendant's request to give a comparative instruction jury because there was no evidence supporting such an instruction. Defendant contends that the instruction was warranted because plaintiff was intoxicated and because of the initial argument between plaintiff and the two other patrons while still in the bar. Even if plaintiff was intoxicated, insulted the patrons with racial slurs, and attempted to hit one of the men, these actions do not lead to a conclusion that plaintiff was comparatively negligent. The two patrons were ejected from the bar and some time passed before plaintiff left the bar and was attacked in the parking lot. The trial court correctly ruled that there was no evidence of comparative negligence to warrant an instruction on it.

VI

Next, defendant argues that plaintiff's counsel improperly argued at closing argument that plaintiff should be compensated for medical expenses, although the medical bills were not admitted into evidence. Defendant contends that such an argument was improper because there was no evidence admitted at trial to support counsel's argument.

Defendant did not object to plaintiff's counsel's argument in this regard, therefore, it is not preserved for appellate review. Moreover, there was evidence of plaintiff's medical damages through plaintiff's trial testimony. Consequently, plaintiff's counsel's argument was based on record evidence and was proper.

VII

Lastly, defendant argues that the jury's damage award is not supported by competent and material evidence. The jury awarded $22,100 for medical expenses and lost wages and $150,000 for pain and suffering. Contrary to defendant's claim, the jury's damage award is supported by the evidence. Plaintiff testified that he owns a roofing business and would make about $2,000 a week. He also testified to his medical expenses and there was ample evidence describing the attack on him in the parking lot. Plaintiff could not work following the attack and was off work during the busiest part of the roofing season (autumn). Accordingly, the jury's verdict is entirely supported by the evidence adduced at trial.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen

I concur in result only.

/s/ Brian K. Zahra